UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

FOODLAND, INC., d/b/a SESSER FOODLAND

Employer

and Case 14-RC-12450

LOCAL 881 UNITED FOOD AND COMMERCIAL WORKERS UNION CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S REPORT ON CHALLENGED BALLOT AND OBJECTIONS AND RECOMMENDATIONS

This report contains the Regional Director's recommendations regarding one determinative challenged ballot and three objections. The Petitioner challenged the ballot and contends that the voter is a supervisor within the meaning of Section 2(11) of the Act. The Petitioner's objections allege that (1) the Employer increased employees' wages to induce them to vote no; (2) the Employer promised employees benefits; and (3) the Employer informed employees that collective bargaining would be futile. For reasons discussed below, I recommend that the challenged ballot be overruled, opened and counted, and that a revised tally of ballots issue. If the revised tally shows that a majority of the votes has not been cast for the Petitioner, I recommend that Objections 1 and 3 be overruled, that Objection 2 be sustained, and that the election conducted on July 24 be set aside and a rerun election be conducted.

Procedural History

Pursuant to a petition filed on June 25, 2003,[1] a stipulated election agreement was executed by the parties and approved by the Regional Director on July 8. On July 24, an election was conducted in the following unit:

> All full-time and regular part-time employees employed by the Employer at its Sesser, Illinois facility, EXCLUDING meat department employees, office clerical and professional employees, guards and supervisors as defined in the Act.

The results of the election were as follows:

Approximate number of eligible voters	9
Void ballots	0
Votes cast for Petitioner	4
Votes cast against participating labor organization	4
Valid votes counted	8
Challenged ballots	1
Valid votes counted plus challenged ballots	9

Challenges are sufficient in number to affect the results of the election.

Timely objections to conduct affecting the results of the election were filed by the Petitioner on July 29.[2]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director caused an investigation to be made of the challenged ballot and the objections. All evidence adduced during the investigation has been fully and carefully considered by the Regional Director who reports and recommends as follows:

Background

The Employer is engaged in the retail sale of groceries and related products. At the time of the election, there were approximately nine employees in the above-described unit, under the overall supervision of Store Manager Shane Burroughs and Assistant Manager Jason Umlaut.

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1 All dates are in the year 2003 unless otherwise specified.
2 A copy of the Petitioner's objections is attached as Exhibit 1.

The Employer purchased the operation from Boulin Foodland in September 2002. The employees of Boulin Foodland were not represented by a labor organization for purposes of collective bargaining.

THE CHALLENGED BALLOT

The Petitioner challenged the ballot of Amber Gulley on the ground that she is a supervisor within the meaning of Section 2(11) of the Act and, therefore, is not an eligible voter. It is the Employer's position that Gulley is an employee properly included in the bargaining unit, possesses no indicia of supervisory authority set forth in Section 2(11) of the Act, is eligible to participate in the election, and, therefore, the challenge to her ballot should be overruled.

Gulley has worked for the Employer since September 2002, and has held the position of assistant manager for the last 6 months. Prior to becoming assistant manager, Gulley was a cashier. She is paid $6 per hour, works 25 to 35 hours per week, and uses the same time clock as other eligible voters. Gulley shares the same terms and conditions of employment as other employees in the unit. She is in apparent charge of the store in the morning and evening when the store manager and the other assistant manager are not in the facility. Her duties include: opening or closing the store several times per week, stocking shelves, approving customers' personal checks, balancing cash register receipts, completing required paperwork relating to cash register balances, counting money, working produce, and occasionally working the cash register. Many of her shifts are in the evening when the only employees are often herself, one cashier, and one stocker. She possesses keys to open and close the facility.

The burden of proving supervisory status is on the party asserting it - here the Petitioner. *NLRB v. Kentucky River Community Care Center*, 532 U.S. 706 (2001). The Petitioner presented no evidence that Gulley possesses any of the supervisory authorities listed in Section 2(11) of the Act except for recommending hire and assigning and directing work.

The only evidence presented by the Petitioner to prove that Gulley can effectively recommend hire is that two of her friends were recently hired. Gulley concedes that she

recommended the two friends for hire, both of whom were hired. However, Gulley did not participate in the interviewing process, rather her friends were interviewed by the store manager without Gulley's participation. The evidence also shows that the other employees, admittedly in the unit, have successfully recommended the hire of friends or have been asked their opinion of prospective employees whom they might know. Where the individuals recommended for hire are independently interviewed by the decision maker, where there is evidence that the Employer welcomes recommendations from employees in general, and where there is no evidence that Gulley's recommendations are effective or given any greater weight than those of other employees within the meaning of the Act, there is sufficient evidence to find Gulley a supervisor based on an authority to effectively recommend hire.

Gulley's role in assigning and directing work is very circumscribed. The store manager determines the shifts employees are to work. The store manager prepares lists of duties to be performed by each classification of employee on a shift for which he is not present. Gulley has her own list of duties, and she gives the stockers' and cashiers' lists to them. She may occasionally instruct employees to do other tasks that arise on the shift. Thus, she may tell a stocker that something needs to be restocked or that an area needs to be cleaned. The only evidence presented that she has "assigned" work to a cashier is that she once asked a cashier to roll coins in coin wrappers for her. Clearly, the assignment of such unskilled, routine tasks does not involve the sort of independent judgment contemplated in Section 2(11) of the Act. *Sears, Roebuck & Co.*, 292 NLRB 753 (1989). If unusual situations arise, Gulley is required to call the store manager for instructions.

While Gulley may urge employees to complete their tasks as set forth on the store manager's list, at times assisting employees to do so, there is no evidence that she has the authority to enforce the assignments or that she is held responsible should other employees fail to complete them. Similarly, Gulley concedes that she can tell an employee to redo a task if it is not correctly done, but evidence of enforcement authority or responsibility is lacking. Gulley has

allowed employees to trade shifts, but does not have the authority to allow employees to take leave except in one situation controlled by the Employer's existing policies. At times, she may tell employees when to take their break and has asked employees to stay with her after the end of the shift while she counts and secures the money and closes the store.

It is clear from the evidence presented that the limited authority Gulley possesses to assign and direct work is of a routine, clerical nature and does not involve the independent judgment required by Section 2(11). See, *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB No. 132 (2002).

Based on a careful review of the evidence presented by the Union, which I fully credit, I conclude that the Union has failed to support its position that Gulley possesses any of its supervisory authorities set forth in Section 2(11).

Accordingly, I recommend the challenge to the ballot of Amber Gulley be overruled.

Objection 1

In its first objection, the Petitioner alleges that the Employer increased its employees' wages to induce them to vote against Local 881. The Employer denies that it engaged in this or any conduct which would provide a basis upon which the election may be set aside.

In support of this objection, the Petitioner presented four employees; all of whom testified that they received wage increases between the date the petition was filed and the date of the election.

For conduct to be objectionable, it must occur during the critical period, which is the period from the filing of the petition through the conduction of the election. *Ideal Electric and Manufacturing Compan*y, 134 NLRB 1275 (1961); *International Paper Company*, 313 NLRB 280 at 294 (1993). The evidence shows that two of the Petitioner's witnesses received wage increases during the payroll period ending May 31, 2003, prior to the filing of the petition. This alleged conduct occurred outside of the critical period, and, therefore, cannot be found objectionable.

While the investigation disclosed that two employees received wage increases during the critical period, such increases were the result of a policy implemented prior to the critical period, and as such, that conduct cannot be a basis for setting an election aside.

There is no evidence that the Employer was aware of any union activity at the time the policy was implemented. No evidence was presented or adduced that would establish that the Employer promised a wage increase or promotions to coerce employees into voting against the Petitioner. *McDonald Land & Mining*, 301 NLRB 463, 470 (1991); cf. *Adam Wholesalers*, 322 NLRB 313, 321-322, and 332 (1996). The Employer followed a policy established before the advent of union activity. *Mallory Controls Company,* 214 NLRB 616 at 618 (1974).

In these circumstances, I conclude that the evidence presented or adduced in the investigation does not support the conduct alleged in Objection 1.

Accordingly, I recommend that Objection 1 be overruled.

Objection 2

In this objection, the Petitioner alleges that the Employer promised employees benefits in order to influence their vote in the election. The facts relative to the consideration and resolution of this objection are not in dispute. Thus, on July 22, the Employer conducted a mandatory meeting for the employees at the Sesser facility. Co-owners John Holmes and Jim Davidson addressed the employees. Holmes read the text from a written speech, distributed copies of a document entitled "Sesser Mor-For-Less Basic Guidelines and Policies," and announced benefits included in that document. The employees were not previously made aware of the granted benefits that were in effect as of March 3.

The Board has held that an employer may not time the announcement of benefits in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness. *Mercy Hospital*, 338 NLRB No. 66 slip op. at 1 (2002). The standard for determining whether the timing of a benefit announcement during the critical period is unlawful is essentially the same as the standard for determining whether the

granting of benefits violates the Act. The Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit. *Star, Inc.,* 337 NLRB No. 151, slip op. at 1 (2002).

The benefits announced at the July 22 meeting were new to the employees; the employees did not have knowledge that they were entitled to benefits announced; and the employees were never informed of the benefits prior to the July 22 meeting. The announcement of the benefits granted on March 3 was not made until July 22, just 2 days prior to an election. The Employer failed to meet its burden of showing that the timing of the announcement was for reasons other than the pending election. The timing of the announcement of benefits justifies an inference that the announcement was related to union activity.

Accordingly, I recommend that Objection 2 be sustained.

Objection 3

In its third objection, the Petitioner alleges that the Employer informed employees that collective bargaining would be futile. The Employer denies engaging in the conduct alleged and maintains that it engaged in no conduct that would provide a basis for setting aside the election.

The burden is on the objecting party to present evidence that the objectionable conduct occurred. *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458, 460 fn. 1 (1998); *Park Chevrolet-Geo*, 308 NLRB 1010 fn. 1 (1992); *European Parts Exchange*, 264 NLRB 224 (1982); *Campbell Products Department*, 260 NLRB 1247, 1249 (1982).

The Petitioner failed to submit any evidence in support of Objection 3. Further, the objection is not supported by any evidence adduced in the investigation.

Accordingly, I recommend that Objection 3 be overruled.

Conclusion and Recommendations

Having recommended that the challenge to the ballot of Amber Gulley be overruled, having recommended that Objections 1 and 3 be overruled and Objection 2 be sustained, it is further recommend that Gulley's ballot be opened and counted at a time and place to be determined. If the revised Tally of Ballots reflects that a majority of the valid ballots has been cast for the Petitioner, further consideration of the Petitioner's objections is not warranted, and it is recommended that a Certification of Representative issue. If the revised Tally of Ballots discloses that a majority of the valid ballots has not been cast for the Petitioner, in having recommended that Objection 2 be sustained, it is recommended that the election conducted on July 24 be set aside, and that a rerun election be conducted at a time and place to be announced by the undersigned Regional Director.[3]

September 12, 2003

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Ralph R. Tremain, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

[3] Under the provision of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC. Exceptions must be received by the Board in Washington by **September 26, 2003**.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party filed with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.